

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Commercial Realty St. Pete, Inc.,)	WT Docket No. 95-26
James C. Hartley, Teresa Hartley,)	
and Ralph E. Howe)	

MEMORANDUM OPINION AND ORDER

Adopted: **August 6, 1999** **Released:** **August 18, 1999**

By the Commission:

I. INTRODUCTION

1. The Commission has before it a Petition for Declaratory Ruling and Other Relief filed on October 8, 1998, by Commercial Realty St. Pete, Inc. ("CRSPI").¹ The Petition seeks to reopen an Agreement of Settlement (Settlement Agreement) between CRSPI, James and Teresa Hartley, Ralph E. Howe (collectively referred to as "CRSPI and its principals") and the Wireless Telecommunications Bureau, dated October 10, 1995 and approved by the the Presiding Judge in this proceeding pursuant to a Memorandum Opinion and Order issued on October 30, 1995.² The Settlement Agreement resolved a Show Cause Order issued against CRSPI and its principals for violations of Commission rules in connection with their conduct in an Interactive Video and Data Service (IVDS) auction held by the Commission on July 28 and 29, 1994.³ CRSPI and its principals also defaulted on required down payments for 20 IVDS licenses on which they had successfully bid at the auction. CRSPI seeks a declaration relieving it of the restrictions of the Settlement Agreement, and for the right to obtain the licenses on which it had originally defaulted. For the reasons discussed below, we deny CRSPI's petition in all respects.

¹See Petition for Declaratory Ruling and Other Relief filed by Commercial Realty St. Pete, Inc., dated October 8, 1998, at 14 ("*Petition for Declaratory Ruling*").

²See *In the Matter of Commercial Realty St. Pete*, FCC 95M-204 (released Nov. 1, 1995) ("*Commercial Realty MO&O*").

³See *In the Matter of Commercial Realty St. Pete, Inc.*, Order to Show Cause, 77 RR 2d 490 (1995) ("*Commercial Realty OSC*").

II. BACKGROUND

2. On July 28 and 29, 1994, the Commission held an auction for IVDS licenses. CRSPI was the successful bidder in 20 IVDS markets. As a winning bidder, CRSPI was required to make a down payment on its successful bids no later than August 8, 1994. CRSPI failed to do so, and therefore, was in default. After the conclusion of the IVDS auction, it came to the Commission's attention that CRSPI may have violated the Commission's rules, including Sections 1.2105(a)(2)(viii),⁴ 1.2105(a)(2)(ix),⁵ 1.2105(c)⁶ (prohibition of collusion); Sections 1.2110(b)⁷ and 95.816(d)⁸ (claiming a false bidding credit); and Section 1.17⁹ (written submission of false financial information). In addition, CRSPI may have abused Commission processes.¹⁰ Consequently, the Commission ordered an investigation into CRSPI's conduct in the IVDS auction. As a result of this investigation, the Commission, *inter alia*, released an Order to Show Cause¹¹ on February 16, 1995 ("OSC") to inquire into CRSPI's auction-related activities.

3. In the OSC, the Commission ordered CRSPI and its principals to show cause why they should not be barred from participating in any future Commission auctions and from holding Commission licenses. The Commission asked whether: (1) CRSPI or its principals misrepresented facts, lacked candor or attempted to mislead the Commission with respect to certain declarations submitted to the Commission; (2) CRSPI or its principals misrepresented facts, lacked candor, or attempted to mislead the Commission in claiming a bidding credit as a woman-owned small business; (3) CRSPI or its principals' "improper communication" with another successful IVDS bidder should bar CRSPI or its principals from future auctions and from holding Commission licenses; and (4) CRSPI or its principals abused the Commission's processes by sending a letter by facsimile to other successful IVDS auction bidders and by releasing a press release prior to the date the first down payment on their bid was due. Pre-hearing conferences were held on March 29 and July 21, 1995. The hearing was scheduled to begin on September 12, 1995; however, prior to the commencement of the hearing, CRSPI, the Hartleys, and

⁴47 C.F.R. §1.2105(a)(2)(viii).

⁵47 C.F.R. §1.2105(a)(2)(ix).

⁶47 C.F.R. §1.2105(c).

⁷47 C.F.R. §1.2110(b).

⁸47 C.F.R. §95.816(d).

⁹47 C.F.R. §1.17.

¹⁰Abuse of process is a broad concept that includes use of a Commission process to achieve a result that the process was not intended to achieve or to use that process to subvert the purpose the process was intended to achieve. See *In the Matter of Commercial Realty St. Pete, Inc.*, Notice of Apparent Liability for Forfeiture, 10 FCC Rcd 4277, 4283 n.13 (1995) ("*Commercial Realty NALF*").

¹¹See *Commercial Realty OSC*, *supra*, 77 RR 2d at 490.

the Bureau reached an agreement in principle on the settlement of those aspects of this case affecting the parties. The Joint Motion for Approval of Agreement followed.¹²

4. In their Joint Motion, CRSPI, the Hartleys, and the Bureau sought ALJ approval of an Agreement of Settlement into which they had entered. Pursuant to the Settlement Agreement, CRSPI and the Hartleys, for a period of 10 years, agreed that they would not participate in any FCC auction proceeding, apply for any additional FCC licenses, hold a five percent or greater attributable ownership interest in any FCC licensee, or operate or control any such licensee. In addition, after an opportunity to appeal the Commission's Memorandum Opinion and Order denying its request for a waiver of the down payment requirement,¹³ CRSPI agreed not to challenge any Commission order charging it with a default penalty, and agreed to be liable for any default penalties currently provided for in FCC rules, with respect to the 20 IVDS licenses for which CRSPI was the successful bidder. The Settlement Agreement specified that CRSPI and the Hartleys did not admit to any wrongdoing in connection with the matters which were the subject of that proceeding, and that the Settlement Agreement would not affect the rights or obligations of the parties with respect to a Notice of Apparent Liability for Forfeiture, released by the Commission on February 16, 1995 ("NALF").¹⁴

5. The Presiding Judge granted the Joint Motion and approved the Settlement Agreement under the terms outlined above. The Presiding Judge determined that the Settlement Agreement was in the public interest and capable of preserving the integrity of the Commission's IVDS auction rules.¹⁵ The Presiding Judge further noted that the Commission encourages parties to an adjudicatory proceeding to settle their differences on a mutually agreeable basis because eliminating the need for further expenditure of Commission time and resources is in the public interest.¹⁶

6. On October 9, 1998, CRSPI filed the instant Petition for Declaratory Ruling and Other Relief seeking to reopen the Settlement Agreement.

¹²*Commercial Realty MO&O*, *supra*, at 1.

¹³See *In The Matter of Requests for Waivers in the First Auction of 594 Interactive Video and Data Service Licenses*, Order, 9 FCC Rcd 6384 (1994) ("Requests for Waivers Order"); *In The Matter of Requests for Waivers in the First Auction of 594 Interactive Video and Data Service Licenses*, Memorandum Opinion and Order, 10 FCC Rcd 12153 (1995) ("Requests for Waivers MO&O 1995"); *In The Matter of Requests for Waivers in the First Auction of 594 Interactive Video and Data Service Licenses*, Memorandum Opinion and Order, 11 FCC Rcd 8211 (1996) ("Requests for Waivers MO&O 1996"); *Commercial Realty St. Pete, Inc. v. Federal Communications Commission*, 116 F.3d 941 (D.C. Cir. 1997) ("Commercial Realty St. Pete, Inc.").

¹⁴*Commercial Realty NALF*, *supra*, 10 FCC Rcd at 4277.

¹⁵*Commercial Realty St. Pete MO&O*, *supra*, at 2.

¹⁶*Id.*

III. DISCUSSION

7. CRSPI raises two arguments in its Request for a Declaratory Ruling. First, CRSPI argues that a conflict of interest on the part of former Commission Chairman Reed Hundt unfairly prejudiced the proceedings.¹⁷ Second, CRSPI maintains that it should be relieved of the terms of the Settlement Agreement because the lack of established IVDS technology in 1995 prevented CRSPI from tendering the required down payment.¹⁸ With a new technology now available, CRSPI argues it should be allowed to reclaim the licenses on which it had once defaulted.¹⁹ As more fully detailed below, we find that neither of these arguments provides a basis for relieving CRSPI from the terms of the Settlement Agreement.

A. Prejudice and Conflict of Interest

8. CRSPI alleges that a conflict of interest on the part of former Commission Chairman Reed Hundt existed at the time of the various adjudicatory proceedings issued against it in the aftermath of the first IVDS auction.²⁰ This conflict, it is alleged, stemmed from Chairman Hundt's prior representation, as an attorney and lobbyist, of Eon Corporation ("Eon"), a participant in the IVDS auction and the main purveyor of IVDS technology.²¹ According to CRSPI, the mere existence of such a prior relationship creates a "conflict of interest" that would require the recusal of Chairman Hundt in any adjudicatory proceeding in which Eon is a party.²² CRSPI requests an investigation by the Commission's Inspector General to "determine the exact nature and extent of Chairman Hundt's relationship with Eon."²³

9. The test for disqualification of a Commissioner from an adjudicatory proceeding on grounds of bias or the appearance of bias is whether "a disinterested observer may conclude that [the decision maker] has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it."²⁴ Moreover, a "requestor seeking the

¹⁷*Petition for Declaratory Ruling, supra*, at 14-16 (¶¶40-48).

¹⁸*Id.* at 16-17 (¶¶49-50).

¹⁹*Id.* at 17 (¶50).

²⁰In its Petition CRSPI identifies only one adjudicatory proceeding: *In the Matter of Inquiry Into Alleged Abuses of the Commission's Auction Processes by Applicants for Licenses in the Interactive Video and Data Services*, Order, 9 FCC Rcd 6906 (1994).

²¹*Id.* at 14 (¶40).

²²*Id.* at 15-16 (¶¶44-48).

²³*Id.* at 15 (¶45).

²⁴*Metropolitan Council of NAACP Branches v. FCC*, 46 F.3d 1154, 1164-65 (D.C. Cir. 1995) (quoting *Cinderella Career and Finishing Schools, Inc. v. FTC*, 425 F.2d 583, 591 (D.C. Cir. 1970)); *In the Matter of Implementation of Section 309(J) of the Communications Act--Competitive Bidding for Commercial*

recusal of a Commissioner from an adjudicatory proceeding must point to specific statements clearly showing prejudgment of both the facts and law of a given case, and such statements must be viewed in the context of the entire case."²⁵

10. In the instant proceeding, CRSPI provides no factual instances of Chairman Hundt's predisposition towards Eon or against CRSPI. CRSPI confines itself to attaching a copy of a newspaper article from *The Washington Post*, dated February 17, 1998, containing statements to the effect that, while a lawyer at the law firm of Latham & Watkins, Chairman Hundt had worked on cases where TV Answer, predecessor to Eon, had been a defendant. The article also states, without specifics, that Hundt had once lobbied for the company. The article further states that at the time of his appointment as Chairman, in September of 1993, Mr. Hundt revealed his past relationship with Eon and was given clearance by the Commission's Office of General Counsel to participate in matters concerning the company.²⁶

11. CRSPI's speculative allegations do not rise to the level of specific statements "clearly showing prejudgment" required by the applicable law of recusal. The newspaper article, upon which CRSPI relies, does not suggest that Eon or CRSPI was singled out for special treatment, give details of Chairman Hundt's opinions about IVDS technology or Eon, imply some continuing arrangement between Chairman Hundt and Eon, identify any impermissible ex-parte communication between Chairman Hundt and Eon, or otherwise indicate that any impermissible factor had influenced his decision in matters pending before the Commission. Accordingly, we conclude that CRSPI has failed to furnish evidence that would cause a disinterested observer to conclude that Mr. Hundt had adjudged the facts or law of the case in advance of hearing it. Thus, there is no evidence that Mr. Hundt's participation unfairly prejudiced the proceedings, and his removal from the CRSPI proceeding was not required.

B. Lack of Prior Technology

12. CRSPI's second argument, that somehow the lack of enabling technology prevented it from tendering the down payment required by Commission rules, is essentially a restatement of prior arguments raised in CRSPI's prior Request for Waivers,²⁷ Application for Review,²⁸ Petition for Reconsideration,²⁹ and Petition for

Broadcast and Instructional Television Fixed Service Licenses, First Report and Order, 13 FCC Rcd 15920, 16007 (¶ 215) (1998) ("*First Report and Order*").

²⁵*First Report and Order*, *supra*, 13 FCC Rcd at 16007 (¶217).

²⁶*See Petition for Declaratory Ruling* at 14 (¶42).

²⁷*See Requests For Waivers Order*, *supra*, 9 FCC Rcd at 6384.

²⁸*See Requests for Waivers MO&O 1995*, *supra*, 10 FCC Rcd at 12153.

²⁹*See Requests for Waivers MO&O 1996*, *supra*, 11 FCC Rcd at 8211.

Review,³⁰ all of which were rejected. For the reasons stated below, we likewise find this argument does not provide a basis for the requested relief.

13. CRSPI readopts the argument, advanced in the above-referenced prior proceedings, that IVDS technology was not sufficiently developed to allow it to meet the Commission's construction, or build-out deadlines. CRSPI then postulates that the unavailability of this technology justifies its decision to withhold the required down payment, and therefore it should be entitled to relief from the forfeiture of its licenses under the Settlement Agreement. We reject this argument for the following reasons.

14. First, information regarding the state of proposed IVDS technology was a matter of public record,³¹ and in the exercise of due diligence, should have been incorporated into the bidding strategy and valuations of any serious participant in the IVDS auction.³² To hold otherwise would have the unacceptable effect of transferring the risk inherent in such bidding from the bidder to the government. It would also require the government to guarantee the success of such ventures post-auction, which the government cannot do.³³ In any event, the proper remedy for a lack of technology would be a request for waiver of the build-out deadline, not relief from the down payment obligations.

15. Second, the down payment required by Commission rules stems from the need to eliminate all but serious bona fide bidders from the auction process and to ensure that public dissemination of the desired services will be widespread and efficient.³⁴ The down payment requirement deters insincere bidders from winning licenses solely with the expectation that, post-auction, they can "shop" their winning bid in a late effort to obtain financing.³⁵ Permitting such actions, we have stated, "would undermine the integrity of

³⁰See *Commercial Realty St. Pete Inc.*, *supra*, 116 F.3d at 941.

³¹*In the Matter of Implementation of Section 309(J) of the Communications Act--Competitive Bidding*, Fourth Report and Order, 9 FCC Rcd 2330 (1994) (modified on other grounds in *In the Matter of Implementation of Section 309(J) of the Communications Act--Competitive Bidding*, Sixth Memorandum Opinion and Order and Further Notice of Proposed Rule Making, 11 FCC Rcd 193419 (1996)); *Requests for Waivers MO&O 1995*, *supra*, 10 FCC Rcd at 12153-54 (¶¶ 4-5).

³²See *Requests For Waivers Order*, *supra*, 9 FCC Rcd at 6384 (¶ 7); *Requests for Waivers MO&O 1995*, *supra*, 10 FCC Rcd at 12153-54 (¶¶ 4-5); *Requests for Waivers MO&O 1996*, *supra*, 11 FCC Rcd at 8213 (¶ 5).

³³*Requests For Waivers Order*, *supra*, 9 FCC Rcd at 6385 (¶ 7); *Requests for Waivers MO&O 1996*, *supra*, 11 FCC Rcd at 8213 (¶ 5); see also *In the Matter of BDPCS, Inc.*, Memorandum Opinion and Order, 12 FCC Rcd 15341 (1997) (inability of the bidder to secure appropriate financing does not justify a waiver of the down payment requirement).

³⁴*Requests for Waivers MO&O 1995*, *supra*, 10 FCC Rcd at 12153-54 (¶¶ 4-5); see also *In The Matter of Implementation of Section 309(j) of the Communications Act--Competitive Bidding*, Second Report and Order, 9 FCC Rcd 2348, 2381 (¶ 190) (1995) ("Second Report and Order") (modified on other grounds in *In The Matter of Implementation of Section 309(J) of The Communications Act--Competitive Bidding*, Second Memorandum Opinion and Order, 9 FCC Rcd 7245 (1994)).

the auction itself.”³⁶ Such an action would also be patently unfair to those bidders that, in good faith, tendered the required down payment in a timely manner. As in its other above-referenced proceedings requesting a waiver, CRSPI has offered no legitimate basis for an exemption from our auction rules governing down payments.³⁷

16. Third, CRSPI’s default of the down payment requirement is immaterial to an action to set aside the Settlement Agreement as it touches only tangentially upon the default, providing that CRSPI and its principals would not contest penalties imposed under a separate Notice of Apparent Liability for Forfeiture.³⁸ The thrust of the Settlement Agreement was to set aside numerous allegations of misconduct surrounding CRSPI’s participation in the IVDS auction in July 1994, and was unrelated to the default of CRSPI’s down payment obligations. Specifically, issues were specified to determine whether: (1) CRSPI or its principals misrepresented facts, lacked candor or attempted to mislead the Commission with respect to certain declarations submitted to the Commission; (2) CRSPI or its principals misrepresented facts, lacked candor, or attempted to mislead the Commission in claiming a bidding credit as a woman-owned small business; (3) CRSPI or its principals’ “improper communication” with another successful IVDS bidder should bar CRSPI or its principals from future auctions and from holding Commission licenses; and (4) CRSPI or its principals abused the Commission’s processes by sending a letter by facsimile to other successful IVDS auction bidders and by releasing a press release prior to the date the first down payment on their bid was due.³⁹ It was these allegations which gave rise to the Order to Show Cause and which were set aside by the instant Settlement Agreement. Indeed in its petition, CRSPI has not addressed any of these additional alleged violations in any manner. It is these other alleged violations which are the thrust of the OSC and which the Settlement Agreement concludes. Thus, an attempt to excuse the default of CRSPI’s down payment obligations does not warrant relief from the restrictions of the Settlement Agreement.

17. Finally, we reject CRSPI’s assertion that subsequent auctioning of the licenses upon which it was the high bidder is not a viable alternative as it would neither bring as high a price as CRSPI is now willing to pay, nor benefit women and minorities under prior preferences, which are now disallowed under the doctrine prescribed by the U.S. Court of Appeals in *Graceba Total Communications Inc. v. Federal Communication Commission*.⁴⁰ CRSPI’s argument fails to recognize that its alleged violative conduct

³⁵See *Requests For Waivers Order*, *supra*, 9 FCC Rcd at 6386 (¶ 12); *Requests for Waivers MO&O 1995*, *supra*, 10 FCC Rcd at 121543 (¶ 2); *see also Second Report and Order*, *supra*, 9 FCC Rcd at 2381-82 (¶ 192).

³⁶*Requests For Waivers Order*, *supra*, 9 FCC Rcd at 6386 (¶ 12).

³⁷See *Requests For Waivers Order*, *supra*, 9 FCC Rcd at 6384-6386 (¶¶ 5-13); *Requests for Waivers MO&O 1995*, *supra*, 10 FCC Rcd at 12153-54 (¶¶ 4-6).

³⁸*Commercial Realty NALF*, *supra*, 10 FCC Rcd at 4277.

³⁹See *Commercial Realty OSC*, *supra*, 77 RR at 492-94 (¶¶ 11-20).

⁴⁰115 F.3d at 1038 (1997).

during and after the IVDS auction is what led to the Order to Show Cause, which was concluded by the Settlement Agreement. Thus, the amount CRISPI is now willing to pay is immaterial to a decision to overturn the Settlement Agreement. Moreover, the record demonstrates that CRISPI has failed to honor any financial obligations such as the one it proposes here. As noted in the OSC, the investigation indicated that CRISPI falsely represented its line of credit and finances.⁴¹ CRISPI also has failed to pay the forfeiture imposed by the NALF, which it agreed to pay in the Settlement Agreement.⁴² Likewise, the basis for CRISPI's claim to a bidding credit does not provide a legitimate reason for overturning the Settlement Agreement. Indeed, the OSC charged that CRISPI falsely claimed a bidding credit as a woman-owned business,⁴³ evidencing that no woman or minority-owned preference ever likely applied to CRISPI. Furthermore, contrary to CRISPI's assertions with regard to auction preferences, the Commission still utilizes the mechanism of bidding credits to attempt to equalize the positions of small businesses competing against larger businesses in current auctions, albeit on a somewhat different basis than that previously employed.⁴⁴ Accordingly, we find that these arguments are also unpersuasive.

IV. CONCLUSION AND ORDERING CLAUSES

18. For the foregoing reasons, we deny Commercial Realty St. Pete, Inc.'s Petition for Declaratory Ruling and Other Relief seeking to reopen the Agreement of Settlement.

19. Accordingly, IT IS ORDERED pursuant to Sections 4(i) and 4(j) of the Communications Act of 1934, as amended, 47 U.S.C. §154(i) and 154(j), Section 5(d) of the Administrative Procedure Act, 5 U.S.C. §554(e), and Section 1.2 of the Commission's Rules, 47 C.F.R. §1.2, that the Petition for Declaratory Ruling and Other Relief filed by Commercial Realty St. Pete, Inc. on October 8, 1998 is DENIED.

⁴¹See *Commercial Realty OSC*, *supra*, 77 RR at 492 (¶¶ 12-15).

⁴²See letter dated March 29, 1999, from Susan Launer (Federal Communications Commission), to Lauren Colby, Esq. (counsel for Commercial Realty St. Pete, Inc).

⁴³See *Commercial Realty OSC*, *supra*, 77 RR at 493 (¶¶ 16-17).

⁴⁴*In the Matter of Amendment of Part 1 of the Commission's Rules Competitive Bidding Procedures*, Third Report and Order and Second Further Notice of Proposed Rulemaking, 13 FCC Rcd 374, 377-78, 380, 529 (1997) (modified on other grounds in *In the Matter of Amendment of Part 1 of the Commission's Rules Competitive Bidding Procedures*, Erratum To Third Report and Order and Second Further Notice of Proposed Rulemaking, 13 FCC Rcd 4621 (1998), and in *In the Matter of Amendment of Part 1 of the Commission's Rules Competitive Bidding Procedures*, Erratum To Third Report and Order and Second Further Notice of Proposed Rulemaking, 13 FCC Rcd 10274 (1998)).

20. IT IS FURTHER ORDERED that the Secretary is directed to send a copy of this Memorandum Opinion and Order to Lauren A. Colby Esq., counsel for Petitioner Commercial Realty St. Pete Inc. by Certified Mail, Return Receipt Requested.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary